IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2015-KA-00948-COA

ANTHONY DAVON JEFFERSON — APPELLANT

v.

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF APPELLANT

(ORAL ARGUMENT REQUESTED)

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vs.

STATE OF MISSISSIPPI **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal:

Mr. Anthony Davon Jefferson, Appellant;

William Andy Sumrall, Esq., trial attorney;

Derek Joseph Goff, Paul Chase Pritchard, George Holmes, and Phillip W. Broadhead, Esqs., Attorneys for the Appellant, Criminal Appeals Clinic, University of Mississippi School of Law;

Michael Guest, Esq., District Attorney, Office of the District Attorney;

Jim Hood, Esq. Attorney General, State of Mississippi;

Honorable WILLIAM E. CHAPMAN, presiding Circuit Court Judge; and

Canton Police Department, investigating/arresting agency.

Respectfully submitted,

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STATEMENT OF ISSUES

ISSUE ONE:

Whether the Trial Court Erred in Overruling Defense's Motion to Suppress the Oral Statement Claimed by the Police, When a Statement Handwritten by the Appellant on the Same Day at Approximately the Same Time Directly Contradicted the Police Version of the Content of the Appellant's Statements during the Interrogation.

ISSUE TWO:

Whether the Trial Court Erred in Failing to Grant Appellant's Motion for Directed Verdict because the Evidence Presented at Trial Was Legally Insufficient, or, in the Alternative, Refusing to Grant the Appellant's Motion for a New Trial, as the Verdict of the Jury Was not Supported by the Overwhelming Weight of the Evidence.

ISSUE THREE:

Whether the Trial Court Erred in Allowing Moser to Testify to Paulette Jefferson's Out-of-Court Statements since the Statements Were Hearsay, No Hearsay Exceptions Applied, and the Statements Violated Anthony's Confrontation Clause Rights

STATEMENT OF INCARCERATION

Anthony Davon Jefferson is presently incarcerated in the Mississippi Department of Corrections.

STATEMENT OF JURISDICTION

This honorable Court has jurisdiction of this case pursuant to ***Article 6, Section 146 of the Mississippi Constitution*** and ***Miss. Code Ann. 99-35-101 (Supp. 2001)***.

STATEMENT IN SUPPORT OF ORAL ARGUMENT

This case is very fact-intensive and the Appellant, through counsel, would respectfully request this Court to grant oral argument to present conflicts in the rulings of the trial court based on the evidence and testimony presented at trial that are alleged by the Appellant to be erroneous.

STATEMENT OF THE CASE

Anthony Devon Jefferson was convicted of possessing marijuana he had never seen, touched, or knew of, based upon a statement to police he never made, in a trial which he never attended. Without ever committing a single violent act, Jefferson was sentenced to sixty years in prison without the possibility of parole. Unless he gets the new trial to which he is entitled, it is unlikely that he will ever see the outside of the prison again.

On November 30, 2011, Anthony Jefferson was indicted for possession of marijuana with intent and conspiracy to possess marijuana. (T.E. 9) He was tried in absentia and was convicted by a jury in Madison County. At a suppression hearing on May 14, 2012, after hearing contradictory testimony from Anthony and two agents about a supposed verbal "confession," the trial judge denied the defense motion to suppress his supposed statement to police. (T. I. 10,

73) Anthony never returned from the recess that followed the suppression hearing and the admittance of this verbal "confession." (T. I 79) When everyone else returned from recess, the trial judge told the venire that since it was late in the afternoon they would proceed with jury selection this next morning. (T. I. 77) On May 15, 2012, Anthony did not show back up to the courthouse for his trial and the trial judge, without hesitation, denied defense motion to continue the case until they could find Anthony. (T. I. 79) A jury was seated and the State presented their case. (T. I. 135)

The story of the trial of Anthony Devon Jefferson (hereinafter "Anthony") began in August, 2011, as he was visiting family in Canton, Mississippi, from California for the funeral of his uncle. (T. I. 61) During this time, he stayed with his aunt, Linda Faye Jefferson. Id. After his arrest by the Mississippi Bureau of Narcotics (MBN), Anthony told police in a verbal and a written statement that he was expecting a box, but he did not know what would be in it. (Exh. S-4, RE. 29)

In the suppression hearing, defense counsel moved to have an unrecorded statement suppressed, in which Anthony supposedly told police that he knew that the box contained marijuana, and he intended to sell it in Yazoo City. Anthony Jefferson testified that the police interviewed him for 30 to 45 minutes. (T. I. 68) Anthony testified that at the beginning of the interview, Agent Moser (hereinafter "Moser") pulled out a tape recorder that was "buckled onto" him and said that he would be recording the interview "for his safety." (T. I. 64) Both of the officers testified that at the beginning of this interview, Anthony stated he knew that a box was coming, but did not know what was in it. (T. I. 40, 58) The officers also testified during the

interview, Anthony eventually made incriminating statements he knew a package was coming from California, he knew that it would have marijuana, and he knew he could make sixteen hundred dollars from selling it in Yazoo City. (T. I. 42) Both officers testified they did not record this conversation, and their testimony was based on memory and notes between them. (T. I. 47) Yet, when asked on direct examination to clarify her statement about there not being a recording of Anthony's statement, Edwards testified "not to my knowledge." Id.

The two officers testified, on the other hand, that they interviewed Anthony for roughly an hour and a half to two hours. (T. I. 41, 58) Both officers and Anthony testified that at the end of the interview, Anthony wrote a statement. (T. I. 45, 57) The statement read, "A box came to my family [sic] house[,] and I didn't know what was in the box[.] I didn't sign for it and never seen what was in the [unknown][,] but I knew a box was coming." (Exh. S-4, RE. 29) Despite Jefferson's conflicting written statement both officers testified was written at the end of the interview, neither officer allegedly decided to record the verbal statement. The alleged verbal statement was devoid of any details, such as names of senders or recipients, which could provide corroboration for the officers' accounts of the interrogation. (T. I. 41-44)

The State's case at trial started with testimony by United States Postal Service Inspector Riley (hereinafter "Riley") that he profiles packages in the mail processing center in Jackson, especially those coming from "border states." (T. I. 147) On August 17, 2011, while he was profiling packages, he supposedly noticed a "white ready box" that was mailed from California, and that he thought it met the profile of a drug parcel because it came from "a source state." (T. I. 147) The package was simply addressed to the "Jefferson Family." (T. I. 28). The box was an

ordinary, white, ready post box mailed from Highland, California, to Canton, Mississippi. (T. I. 34-35) Riley placed the box with other boxes that he had profiled and then contacted Richland City Police Detective Ed Steed (hereinafter "Steed"). (T. I. 150)

Riley called Steed to bring the drug dog, Benjie, to the processing site to look over the packages that Inspector Riley had profiled for the day. (T. II. 1) Steed testified he has worked with Benjie for two and a half years and Benjie is trained in Dutch. (T. II. 15) When Steed arrived at the postal distribution center he took Benjie into the room where the boxes were located, and that is where he gives Benjie the command "Zook." (T.II. 15) Steed stated that after Benjie hears the command that he starts looking for narcotics. (T.II. 15) Steed then testified as the dog walked around the packages they were waiting for him to either scratch a package, bite a package, or just even sit down. (T. 151) He further testified "it all depends on how the dog acts" if there may be drugs in a package. (T. II. 151) According to Riley, The dog scratched the "white ready post box" and Riley obtained a federal search warrant to open the package and was able to open the package and found what he thought was marijuana. (T. II. 151) Inspector Riley delivered the package the next day as part of a "controlled delivery" with law enforcement agents from the Mississippi Bureau of Narcotics and Canton Police Department. (T. II. 151) Riley testified he dressed as a postal worker and completed a controlled delivery of the box- to the intended address, 331 Dobson Ave, Canton, Mississippi. (T. II. 152) Riley testified -he asked the lady who answered the door, Paulette Jefferson, if she was expecting a package, and she answered "Yes." (T. II. 154) Paulette Jefferson accepted the package, Riley left the porch, and entered the postal truck. (T. II. 156) Riley admitted on cross-examination and it is undisputed

that Anthony's name was nowhere on the package and that Anthony Jefferson was not at the house when he delivered the package. (T. II. 157-59)

The State then called Steed who testified that when Benjie (the narcotics detection dog) passes a box with narcotics in it, "he will give me a good change in behavior." (T. II. 160, 165) Then Steed will let him inspect the individual package and that is when Benjie scratched the package. (T. II. 166) On cross-examination Agent Steed stated that Anthony Jefferson's name was nowhere on the box and that he has known Benjie has made false alerts over the last two and half years they have worked together. (T. II. 169)

MBN Agent Candace Edwards (hereinafter "Edwards") testified next for the prosecution about the controlled delivery at 331 Dobson Avenue in Canton. (T. II. 171-73) Edwards obtained an "anticipatory search warrant" for the home that became effective once the package was delivered. (T. II. 173, Exh. 1) At the time of the controlled delivery, she was inside an unmarked car parked beside the delivery address. (T. II. 174) Riley approached the house, knocked on the door, and Paulette Jefferson answered. Id. It is undisputed from the record when the controlled delivery took place, Paulette Jefferson signed for the packaged while she was standing on the porch of the residence. At that point, Edwards pulled up behind the postal truck. Paulette Jefferson noticed the vehicle and threw the package on the corner of the porch, ran back into the house, and attempted to close the door. (T. II. 175) Edwards' partner saw this and ran toward the house to stop her. (T. II. 175) The home was searched, and misdemeanor amounts of marijuana were found in the residence and others were arrested. (T. II. 176, 177) It is undisputed from the record Anthony Jefferson was not in the residence at the time the police

made the controlled delivery or arrests. (T. II. 177) Edwards then testified Paulette told Edwards the box belonged to her nephew Anthony, and he was on his way to her home. (T. II. 198) Sometime later, Anthony Jefferson and his father arrived at the house, and were arrested. Id. It is undisputed Anthony Jefferson returned to the house after the package was delivered. (T. II. 201) Prior to and during the arrest, the package was in the possession of the police.

Edwards then testified about the Miranda warning and the waiver of rights form that Anthony signed. (T. II. 208) Edwards also testified she read the forms to him and he signed them twice. (T. II. 208) She then stated the "interview" lasted about an hour and half and, at first, Anthony told her that he knew a box was coming, but he did not know what was in the box. (T. II. 212) After some time into the interrogation, Anthony then supposedly told her that he was going to take the box to Yazoo city to sell the marijuana for a lot of money and that this was a test run, that typically the person would ship 10-20 pound at time. (T. II. 214-15) Yet, Edwards said after this extremely lavish story of being a drug kingpin, Anthony wrote the same statement that he told police at Paulette's house, and repeated again when the interview began, that he knew a box was coming, but did not know what was in the box. When asked on direct examination if the ever records statements Edwards testified "I'm sure there are agents with agencies that do that, but I don't do that. It's not my practice to do that anyway." (T. II. 216) During cross-examination when asked if it was convenient not to record statements, Edwards testified "It's convenient not to." (T. II. 218) Edwards stated that "it just not my practice to do it," when asked about bringing recording devices to record statements. (T. II. 219) Yet, when pressed on cross examination Edwards admitted to bringing a camera to take a picture, which is

standard procedure. (T. II. 219)

Investigator Anthony Moser (hereinafter "Moser") of the Canton City Police Department was the next witness called by the State. (T. II. 230) Moser told a similar, but slightly different story, about Anthony's statement during his interrogation. (T. II. 232-33) Moser testified it is preferable to record statements during interrogations. (T. II. 237-38) On cross-examination, Moser then testified that the jail does not allow any recording devices in the jail, yet when pressed, he admitted Edwards brought a camera into the interrogation. (T. II. 238) Again on cross-examination, when pressed Moser, could not remember if he had to leave his phone in the front or had it in his pocket during the interrogation. (T. II. 238)

The next witness the State called was Lieutenant Wesley Layton (hereinafter "Layton") of the MBN. (T. II. 241) Layton testified about his supervision of the controlled delivery, as well as his involvement in the investigation that followed the delivery. (T. II. 241-44) The trial judge overruled defense objection to statements made by Anthony to Layton while in handcuffs and under arrest. (T. II. 244, RE. 30) Layton then testified that in that statement without a Miranda warning, Anthony told him "the box was his and that he didn't want anyone else to get in trouble." (T. II. 245) When asked on cross-examination if it would be a better practice to record statements so there would never be an argument about what was said, Layton testified "I agree." (T. II. 247)

The last witness the State called was Chancey Bass, forensic scientist for Mississippi crime laboratory. (T. II. 99) Ms. Bass was entered as an expert in forensic chemistry and testified the substance found in the "white ready box" was 4.4 pounds of marijuana. (T. II. 252) After the

presentation of the State's case, the defense moved for a directed verdict. (T. II. 262-64, RE. 25-27) The trial judge denied defense motion. (T. II. 264, RE. 25-27) The defense rested its case without calling any witnesses. (T. II. 264)

Based on the testimony, evidence, instructions from the court, and arguments of counsel, the jury returned a verdict of guilty to both charges of possession with intent and conspiracy to possess. (T. II. 278-79)

During the sentencing hearing, the prosecutor entered two copies of prior convictions into evidence. (T. II. 283) The first occurred in April 2000 and the second October 2006, both of which Anthony was sentenced to two years for possession of cocaine in California. (T. II. 283) The defense objected to the admission of the copies of these convictions, as they did not comply with the certification statutes. (T. II. 284) Both were admitted into evidence, and the trial judge granted State's post-trial motion to enhance the sentence of Anthony Jefferson as a non-violent habitual offender. (CP. 54/ T. II. 132-36) (T. II. 131-34) The indictment did not state that the prosecution would be seeking the enhanced sentence. (T.E. 9-11) The prosecutor mentioned only once on the record in Anthony's presence that they intended to seek an enhanced sentence, though the prosecutor admitted that he did not "have all of the abstracts of conviction from... California." (T. II. 6) Anthony was sentenced to sixty years on the charge of possession with intent and forty years on the charge of conspiracy to possess, with both sentences to run concurrently. (T. II. 135) After the post-trial motions by the defense were denied by the trial judge (CP. 115-116, 127; RE. 20-22), and feeling aggrieved by the verdict of the jury and the sentence imposed by the trial judge, Anthony Jefferson perfected his appeal to

this honorable Court. (CP. 128-129, RE. 23-24)

SUMMARY OF THE ARGUMENT

Anthony Devon Jefferson was convicted of possessing marijuana he had never seen, touched, or even knew of, based upon a statement that he never made, in a trial which he never attended. Without ever having committed a single violent act, Jefferson was sentenced to sixty years in prison without the possibility of parole. Unless he gets the new trial to which he is entitled, it is unlikely that he will ever see the outside of the prison.

The only evidence of a conspiracy between Paulette Jefferson and Anthony Jefferson entered the consideration of the jury by means of inadmissible hearsay evidence, which unfairly prejudiced the jury from the moment the prosecution included it in their opening statement. Through Agent Edwards' testimony about the inadmissible hearsay, and the prosecution's use of the statement in opening argument, the State knowingly used impermissible tactics to insure the jury would hear police repeat a statement supposedly made by Paulette Jefferson. The trial judge recognized that these statements are hearsay, and ordered the prosecutor to refrain from eliciting any statements made by Paulette to police. However, the prosecutor brought these statements in anyway, by simply referring to the original speaker more generally. The trial judge overruled defense's objection. These inadmissible statements were the only evidence offered by the prosecution in an attempt to prove a conspiracy between Anthony and Paulette.

Additionally, the prosecution failed to assert any theory by which Anthony Jefferson could have actually or constructively possessed the marijuana, and in fact, it is factually impossible for

Anthony to have "constructively possessed" the package. In order to constructively possess the marijuana, Anthony would have to be "aware of the presence and character of the particular substance" and be "intentionally and consciously in possession of it." When physical possession does not exist, a defendant may be charged with constructive possession only if he exercised dominion or control over the package. However, Anthony was not even aware of the delivery of the package until after he returned home, saw the police at his house, and was immediately arrested. Even if Anthony's alleged unrecorded oral statement, which completely contradicted his written statement, the proof presented at trial only shows Anthony perhaps had the intent to possess the package at some future time. Further, Anthony was a temporary house guest; therefore there is no presumption that he had dominion or control over anything in the house. Even if the presumption did exist, it is undisputed from the record the package never entered the home. Finally, the Mississippi Supreme Court has held that proximity is usually required for constructive possession, but even that is not enough without further incriminating evidence. Anthony was never close to the package until both it and he were securely under the police's exclusive dominion and control. Even if everything within the prosecution's case were accepted as true, the elements of constructive possession were not established, and therefore, the State's case was legally insufficient.

Finally, the trial court erred in failing to exclude an unrecorded oral statement allegedly made by Anthony during a police interrogation. Despite the undisputed fact that Anthony wrote a statement in complete contradiction to the oral statement immediately after the statement was allegedly made, the police refused to use a tape recorder. Anthony testified that

he did not make the oral statement, but had said the same thing that he had written down. This closed door statement was reproduced only from the memory of the officers and was the only evidence to suggest that Anthony knew the contents of the package.

Following an error-ridden trial Anthony was found guilty. The jury reached a verdict based on evidence presented that failed to rise to the Constitution's requirement that all accused citizens receive a fair trial. Therefore, for the above reasons, this honorable Court should reverse and render this case, thereby discharging the Appellant from custody of the Mississippi Department of Corrections, or, in the alternative, reverse and remand this case for a new trial on the merits, with proper instructions to the lower court.

ARGUMENT

ISSUE ONE:

Whether the Trial Court Erred in Allowing Moser to Testify to Paulette Jefferson's Out-of-Court Statements since the Statements Were Hearsay, No Hearsay Exceptions Applied, and the Statements Violated Anthony's Confrontation Clause Rights

Anthony Jefferson was surprised when he arrived back to his Linda Faye Jefferson's house on August 18, 2011, and was greeted by numerous police officers. Anthony had only been in Mississippi for a few days for a family funeral and was out running errands with his father while the "controlled delivery" by police happened. It is undisputed from the record no one at Linda Faye's home was able to get into contact with Anthony after the package was delivered. Anthony was rushed by police and arrested before he was questioned about a box he had never seen. Anthony was aware a box was coming from a friend in California but did not know what

was in it and never discussed this box with Paulette Jefferson.

Anthony is entitled to having his conviction for conspiracy to possess marijuana reversed and rendered, as the only evidence that the prosecution presented at trial in attempt to show conspiracy was inadmissible hearsay. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the matter asserted." ***Miss. R. Evid. 801(c)***. The Appellant alleges that his constitutional right to confront witnesses against him was violated, therefore, the standard of review for this issue is *de novo*. ***Singleton v. State***, 1 So. 3d 930, 934 (Miss. Ct. App. 2008).

A. Prosecution's Reference to Inadmissible Hearsay Testimony during Opening Statements

The Mississippi Supreme Court has held "[u]nquestionably, it is reversible error for counsel in opening statement to allege facts which are either inadmissible as evidence, or which he knows he cannot prove." ***General Motors Corp. v. Jackson***, 636 So. 2d 310 (Miss. 1994).[1] According to ***Mississippi Rule of Evidence 103(c)***, "proceedings shall be conducted to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements... in the hearing of the jury." ***Miss. R. Evid. 103(c)***. The intention of the prosecution to use inadmissible hearsay as a means of attempting to prove a case they knew they did not have was made very clear in opening statements.

During opening statements and over defense's objections, the prosecution told the jury that "Paulette Jefferson said that's not my package. She said that's Anthony Jefferson's package.

[1] Though this is a civil case, the Mississippi Supreme Court has held "hearsay evidentiary rules are applied in the same manner in both civil and criminal cases." ***In the Interest of C.B.***, 574 So. 2d 1369, 1376 (fn.1) (Miss. 1990).

He told me it was coming. He told me to expect it." (T. I. 140). The prosecution informed the jury that "evidence is going to show that, upon questioning,... Ms. Jefferson said, look that's not my package[.]" (T. II. 140). It is undisputed from the record Paulette Jefferson never testified at the trial. The alleged statements referenced by the prosecutor were objected to by the defense as pure hearsay, but the judge allowed the prosecutor to poison the jury on the grounds the prosecutor could "set it up in opening statement" even if "he can't prove it later on." (T. I. 141). The trial judge also told the defense attorney he could later "point... out" that the prosecution could not prove it. (T. II. 141). However, the mere suggestion of this inadmissible hearsay statement was prejudicial, and it tainted both the trial and the jury from the very beginning. The statement was offered to prove the matter at hand (the existence of a conspiracy). The prosecutor's prejudicial injection of this inadmissible evidence had the same result on the jury as if the prosecutor had taken the stand himself and testified to what Paulette had allegedly said.

During the colloquy as a result of the defense objection, the prosecutor further misquoted Paulette to say that she had spoken to Anthony to say that the package was coming. (T. I. 140). This hearsay evidence was prejudicial and inadmissible from the beginning. Contrary to the judge's statement, it is not the defense counsel's task to "point out" that the prosecution was not ultimately able to bring in the inadmissible evidence that he already provided by way of opening statements. (T. I. 141).

B. *Inadmissible Hearsay Testimony at Trial.*

At trial, the prosecutor asked Edwards "how it came that Anthony Jefferson arrived to the scene and what happened after he arrived." This called for Edwards to establish the essential

element of conspiracy through an admission of Anthony's alleged co-conspirator. In front of the jury, Edwards began stating "Okay, the lady who signed for the box stated that—" (T. II. 177). The defense objected to the hearsay at that point, and the prosecution argued it was the statement of a co-conspirator, and was therefore admissible under ***Mississippi Rules of Evidence 801(d)(2)(E)***. This rule states that a statement is not hearsay when (1) the statement as an admission by an opposing party, and (2) was made by the party's coconspirator (3) "*during the course and in furtherance of the conspiracy.*" ***Miss. R. Evid. 801(d)(2)(E)*** (emphasis added). However, the United States Supreme Court has held any statements that occur after the alleged conspiracy succeed or fail are inadmissible. ***Krulewitch v. United States***, 336 U.S. 440 (1949). At the time Paulette allegedly made these out of court statements, it is undisputed that she was in police custody, so any conspiracy that might have existed[2] certainly had ended. (T. II. 176-177; 139, RE 34-36).[3]

Even ***Crawford v. Washington*** reflects this requirement of Rule 801. ***Crawford v. Washington***, 541 U.S. 36, 52, 68 (2004). *Crawford* is a United States Supreme Court case cited in the defense objection during opening statements (T. I. 141) and by the prosecution in support of his contention that this statement by an alleged co-conspirator was not hearsay (T. II. 178). In ***Crawford***, the Court stated in dicta that "exceptions to confrontation have always been derived from the experience that some out-of-court statements *are just as reliable* as cross-examined in-

[2] *See* Issue II, below.

[3] Even assuming the statements were made in the course of the conspiracy, ***Miss. R. Evid. 801(d)(2)*** states, the "contents of the statement shall be considered but are not alone sufficient to establish... the existence of the conspiracy and the participation therein of... the party against whom the statement is offered..."

court testimony due to the circumstances in which they were made... Because statements [by co-conspirators] are made *while the declarant and the accused are partners in an illegal enterprise...*" they are more likely to be true. ***Id*** at 74. ***Crawford*** only allows the admission of testimonial statements into evidence where the defense had a prior opportunity to cross-examine. ***Id.*** at 59. On the other hand, statements made to police while under interrogation are "testimonial under even a narrow standard," and "the only indicum of reliability sufficient to satisfy constitutional demands is ...confrontation." ***Id.*** at 68.

The trial judge rightly held this hearsay statement allegedly made by Paulette to be hearsay (T. II. 190-91), also case law holding "that a violation of the [C]onfrontation [C]lause by admission of a co-defendant's out of court statement which implicates the defendant in a crime cannot be cured by the granting [of] cautionary instruction..." (T. II. 191) (*quoting* ***Smith v. State***, 986 So. 2d 290, 299 (Miss. 2008). The prosecutor then cited ***Rule 801(d)(2)(A)***, which allows a statement by a party to the litigation to be entered against that same party. The prosecutor stated he intended to "offer[] the statement against a party, and it's the statement of the party." (T. II. 192) The only one on trial, and the only one that has been tried, is Anthony, and of course, the statement was made by Paulette, who was not a party at trial.

The prosecution also argued if the trial judge were to find the statements to be inadmissible hearsay, an exception would apply under Rule 804. (T. II. 191-92) The trial judge rightly pointed out that the rule of evidence cannot "trump[] the United States Constitution." (T. II. 192). The only exception that could conceivably apply in this case is Rule 804(b)(3) "Statement against interest." ***Miss. R. Evid. 804(b)(3)***. This exception provides that a statement is not

excluded by the hearsay rule if the declarant is unavailable and "at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, ...that a reasonable man in his position would not have made the statement unless he believed it to be true." ***Id.*** First, none of the hearsay exceptions under Rule 804(a)(5) can apply *unless* the prosecution first shows that it has made "diligent efforts" to locate the witness and the court finds that the witness is unavailable. ***Stoop v. State***, 531 So. 2d 1215, 1220 (Miss. 1988). Furthermore, this exception does not apply to the current facts because Paulette was under arrest, and her "admissions" included no statement she had committed a crime. According to the police, she was supposedly told by either Anthony or his girlfriend to expect a box (T. II. 198), but she did not provide any admission she knew or even suspected that drugs were in the package. Therefore, this statement, if made, was far more likely made by Paulette in effort to exonerate herself than admit guilt, as the statute requires. In short, any reasonable person would make the statement that Paulette allegedly made without fear that it would subject them to criminal liability, and, therefore, it does not fall within the exception as claimed by the prosecution.

The judge then permitted the prosecutor to question Edwards about what she had "learned" in the course of her investigation, but ordered him to avoid bringing in the statement. (T. II. 195-96, RE. 34-36). After the colloquy with the trial judge, in a thinly veiled and constitutionally deficient attempt to circumvent the hearsay rules and Anthony's right to confront his accuser, the prosecutor asked what Edwards "was able to determine in the course of [her] investigation" in regards to the delivery of the box. (T. II. 197). Edwards merely replaced

the words "the lady who signed for the box stated...," which were already heard by the jury, to "*we were advised* that someone was supposed to contact Mr. Jefferson and advise him that the box had been received..., the plan was that he was going to come get it because *the person at the residence* had spoken to Mr. Jefferson, or someone significant to Mr. Jefferson... to advise the female who sent the box that it should be coming." (T. II. 198) (emphasis added).

This entire hearsay statement by the police witness was then allowed to be admitted by the trial judge over defense counsel's objection, which specifically pointed out that Edwards was "making direct reference" to the inadmissible hearsay in the previous objectionable question, which was sustained by the trial judge. (T. II. 198, RE. 37). Despite his prior ruling which sustained the objection, the judge overruled this objection with the reply, "[t]hat's part of her investigation." *Id.* The prosecution was able to effectively insert Paulette's hearsay statement in her absence by Edwards (who was sitting in the witness box listening to the colloquy after the first defense objection was sustained) simply saying (1) "we were advised" instead of "she said" and (2) referring to her as "the person at the residence" instead of "Paulette." (T. II. 198) Not only did this constitute hearsay within hearsay, Edwards also impermissibly testified as a lay witness to events of which she had no knowledge. *See generally*, ***Estate of Carter v. Philips & Philips Constr. Co.***, 860 So. 2d 332 (Miss. Ct. App. 2003).

Merely omitting the identity of the declarant does not remove the statement from the definition of hearsay, which is "a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ***Miss. R. Evid.* 801(c)**. In ***Favre v. Henderson***, the Fifth Circuit Court of Appeals held that testimony based

on an out of court statement, even without identification of the speaker, is hearsay. ***Favre v. Henderson,*** 464 F.2d 359 (5th Cir. 1972). In ***Favre***, Robert Favre was arrested and convicted of armed robbery. At trial, the prosecutor called a police officer to the stand to testify about the investigation. ***Id.*** at 360. The prosecutor asked the officer, "Now I am not interested in anything that anyone may or may not have told you. However, I do ask you what was the source of the information which you had at that time?" The officer answered "From a confidential informant." ***Id.*** at 361. Without ever referencing a single out of court statement, the court held the officer created a logical inference for the jury that the informant had led the officer to suspect and ultimately arrest Favre. ***Id.*** at 362. The Fifth Circuit held this inference essentially created one out of court statement: "Favre committed the crime," and with this statement, evidence of both (1) identity and (2) guilt was established. ***Id.*** The Fifth Circuit held that this inference created by the officer's testimony violated Favre's Confrontation Clause right and remanded for determination on whether it was harmless error. ***Id.*** at 364. Despite the presence of four other eyewitnesses' identification of Favre,[4] the district court held the error was not harmless beyond a reasonable doubt. ***Id.*** at 367. The Fifth Circuit affirmed. ***Id.***

In Anthony's case, the same error occurred. Edwards testified that the police "were advised that someone was supposed to contact *Mr. Jefferson* and advise him that the box had been received and... *the plan was* that he was going to come get it because the person at the residence had spoken to Mr. Jefferson, or someone significant to Mr. Jefferson, earlier in the day to advise the female who sent the box that it should be coming." ***Id.*** at 198. With this

[4] The Fifth Circuit noted that the defense had case some doubt on the eyewitnesses' accounts.

statement, Edwards provided the only evidence that Paulette had (1) *identified* Anthony or someone significant to him and (2) that they had agreed to receive the package.

This testimony was provided by the prosecution to prove agreement, a required element to establish conspiracy, and was obviously offered to prove the truth of the matter asserted. The prosecution's witnesses may not simply circumvent the hearsay rules by referring to the speaker more generally when the statements remain the same. If this is not reversible error, then the hearsay rules and constitutional right to confront one's accusers has no effect.

C. The prosecution's failure to establish the preliminary fact of a conspiracy.

In **Ponthieux v. State**, the Mississippi Supreme Court held, "that before a co-conspirator's testimony could be admitted under ***Miss. R. Evid. 801(d)(2)(E)***, the prosecution had the obligation to establish the preliminary fact of the existence of the conspiracy...." ***Ponthieux v. State***, 532 So. 2d 1239, 1244 (Miss. 1988). The prosecution then has the burden of proving that a conspiracy existed before the beginning of the primary charge by offering evidence of a plan or motive in order to employ Mississippi Rule of Evidence 104(a) to establish **Rule 801(d)(2)(E)** admissibility of the hearsay statements Paulette Jefferson supposedly made to police. ***Ponthieux***, 532 So. 2d at 1244.

Since the trial court failed to make a preliminary finding of fact under Rule 104 that a conspiracy existed this honorable Court should examine the entire record to determine if a conspiracy existed. "While the Circuit Court is necessarily limited to the evidence offered at the Rule 104 hearing, on appeal our view is much broader. We search the entire record to determine whether the preliminary fact has been established. It is to the entire record that we employ a

clearly erroneous standard of review." ***Ponthieux***, 532 So. 2d at 1244. In Anthony's case, even if everything in the prosecution's case was assumed to be true (which this Court does not have to do), the prosecution still failed to establish the preliminary fact of the existence of a conspiracy under Rule 104.

The prosecution must meet their burden under Rule 104 by offering evidence that a conspiracy between the two parties existed. Looking at the entirety of the evidence based on ***Ponthieux***, the only "evidence" the prosecution offered to prove a conspiracy existed was - Anthony was staying at his family's house for a funeral for which he traveled across country. (T. I. 61) Anthony Jefferson's un-Mirandized statement when he arrived to his family's house after he was arrested was, "It is my box, I don't want anyone to get in trouble." (T. II 245) Still, Anthony's in-custody, Mirandized written statement of "I knew a box was coming, but did not know what was in the box," (Exh. 4, RE. 29) does not meet the elements required for conspiracy in Miss. Code Ann. § 97-1-1 (Supp. 2013). "Conspiracy is a combination of two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose unlawfully, the persons agreeing in order to form the conspiracy." ***Griffin v. State***, 480 So. 2d 1124 (Miss. 1985) (emphasis added). There was no evidence presented that connected Paulette to Anthony. Edwards, the prosecution's witness, testified that "he was very angry that his aunt signed for the box." (T. II. 214)

Even looking at the hearsay statement the prosecution was trying to elicit from Edwards' testimony that Paulette received a phone called from a woman named Michelle, who is allegedly Anthony's girlfriend, told Paulette that she (Michelle) was shipping a box and to sign for it when

it arrived. (T.II. 180) This rank double-hearsay statement the prosecution hangs their hat on still fails to establish a conspiracy between Paulette and Anthony. First, Paulette would need to know that the box contained something illegal and there was no evidence presented at trial she had this knowledge. More importantly, the unproven, double-hearsay conversation was between Paulette and Michelle, and Anthony was not mentioned in this conversation and had no knowledge of this conversation. The Appellant submits there simply is not sufficient evidence of a conspiracy to find a preliminary fact of the existence of a conspiracy under Rule 104(a), and the Appellant contends under the clearly erroneous standard of review, this Court should find this "preliminary fact has been established." ***Ponthieux***, 532 So. 2d at 1244.

"A finding of fact is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." ***Ponthieux***, 532 So. 2d at 1244 (emphasis added). Looking at all of the evidence offered at trial, when the prosecution failed to establish the preliminary fact that a conspiracy existed under Rule 104(a), therefore, the trial judge erred in allowing the supposed statements into evidence under Rule 801(d)(2)(E). Accordingly, the Appellant requests this Court to find the trial judge's ruling "clearly erroneous" as to the "confession" suppression issue, reverse this case, and remand it to the lower court with proper instructions for a new trial.

Given the facts that the trial court violated Anthony's constitutional right to confront Paulette as a witness against him and admitted hearsay testimony in violation of the Mississippi Rules of Evidence, "harmful" error has occurred. Reversal is warranted when an error affects the substantial right of a party. ***Lynch v. State***, 877 So. 2d 1254, 1281 (Miss. 2004). Adding this

to the fact the prosecution used inadmissible, rank hearsay in an attempt to link Anthony to a conspiracy and there was no other evidence offered at trial to show an agreement between Paulette and Anthony, his conviction should be reversed and remanded to the lower court with proper instructions for a new trial.

ISSUE TWO:

Whether the Trial Court Erred in Failing to Grant Appellant's Motion for Directed Verdict because the Evidence Presented at Trial Was Legally Insufficient, or, in the Alternative, Refusing to Grant the Appellant's Motion for a New Trial, as the Verdict of the Jury Was not Supported by the Overwhelming Weight of the Evidence.

Although legal sufficiency and weight of the evidence are analytically distinct evaluations under the jurisprudence of this State, the two standards jointly reveal the aforementioned errors and, therefore, will be treated herein as two issues within the same argument section.

A. *Legal Sufficiency Defined*

The standard of appellate review for challenges to the legal sufficiency of the evidence is articulated in ***Bush v. State,*** 895 So. 2d 836 (¶17) (Miss. 2005) (*citing* ***Jackson v. Virginia***, 443 U.S. 307, 315 (1979)). In ***Bush***, the Court restated that "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." ***Id.*** The Court also emphasized that "[s]hould the facts and inferences considered in a challenge to the sufficiency of the evidence "'in favor of the defendant on *any* element of the offense with sufficient force that reasonable men could not have found beyond a reasonable doubt that the defendant was guilty,' the proper remedy is for the appellate court to reverse and render." ***Id.*** (emphasis added) (citing ***May v. State***, 460 So. 2d 778, 781 (Miss. 1984)).

B. *Legal Sufficiency of the Conspiracy to Possess Marijuana Charge*

To convict a defendant under Section 97-1-1 but the evidence must show "recognition on the part of the conspirators that they are entering into a common plan and knowingly intend to further its common purpose." ***Lee v. State***, 756 So. 2d 744, 747 (Miss. 1999). The Mississippi Supreme Court held "the elements of conspiracy require 'recognition on the part of the conspirators that they are entering into a common plan and knowingly intend to further its common purpose." ***Sanderson v. State***, 883 So. 2d 558 (Miss. 2004).

The prosecution failed to provide evidence sufficient to establish by evidence beyond a reasonable doubt a conspiracy between Paulette and Anthony. According to Jury Instruction Number 5 granted by the trial judge, Anthony could only be convicted of conspiracy if he "feloniously and knowingly conspired with *Paulette Jefferson* to possess... Marijuana." (CP. 69, RE. 38) (emphasis added). The Appellant submits the trial judge erred in overruling the motion for directed verdict, peremptory instruction to the jury, and the post-trial motion for JNOV as to the count of conspiracy since the evidence in the case "'point[s] in favor of the defendant on [all] element[s] of the offense with sufficient force that reasonable men could not have found beyond a reasonable doubt that the defendant was guilty,' [therefore] the proper remedy is for the appellate court to reverse and render." ***Bush***, 895 So. 2d at ¶17.

According to Edwards' testimony regarding Paulette's supposed, unrecorded statements, "the plan was that [Anthony] was going to come get it because the person at the residence had spoken to Mr. Jefferson, *or someone significant to Mr. Jefferson*, earlier in the day to advise the female who sent the box that it should be coming." (T. II. 198). At best, this hearsay statement

shows Paulette was informed by "someone significant to [Anthony]" that a package was coming. There was no evidence that Anthony was even aware that this "someone significant" had ever spoken to Paulette. At no point in the trial was it shown that Anthony and Paulette agreed that Paulette would take possession of the package on behalf of Anthony, and the only communication that was shown existed between Paulette and this "someone significant." This statement could establish a conspiracy between Paulette and this unnamed person, *only if* it had mentioned that the box contained marijuana and included an agreement for Paulette to commit some action in furtherance of the conspiracy. However, unless the prosecution proved by evidence beyond a reasonable doubt Anthony *knowingly* entered into an agreement in which he knew that Paulette would receive the package on his behalf, there is no conspiracy *between Anthony and Paulette*.

The circumstantial evidence provided by the State does not support the finding of a conspiracy between Paulette and Anthony, even taken in a light most favorable to the prosecution. The prosecution established Paulette (1) used a false name when signing for the package and (2) threw the package onto the porch when she noticed the police. Several equally plausible scenarios can be inferred from this behavior. This "significant someone" may have told Paulette what was inside of the box, they may have refrained from informing her, or they may have told her contained marijuana, cocaine, or ten thousand dollars. Additionally, this person may have asked her to receive it on their behalf, or provided no instruction whatsoever. Several possibilities would explain why she signed a false name and threw the package down as well. First, Paulette had good reason to avoid signing her real name and connecting herself to

Linda Faye's home, because there were drugs inside the home.[5] The presence of these drugs also explains why she ran inside when she saw the police. She wanted to dispose of the drugs. Second, Paulette may have been suspicious of any package coming to Linda Faye's house. However, *only one* of the possible inferences gives rise to a conspiracy charge: [1] *Anthony himself* would have to advise Paulette that a package [2] *containing marijuana* was to arrive at the home, *and* they would have to [3] jointly agree that Paulette take possession of the package on behalf of Anthony. Not a single piece of evidence supports the inference that Anthony spoke to Paulette or agreed in any way that she would receive the package on his behalf. Furthermore, no evidence whatsoever shows that Paulette knew what she was supposed to be possessing. In any case, speculation about what may or may not have happened does not rise to the level of proof beyond a reasonable doubt.

After Edwards' testimony, the inference supporting a conspiracy between Anthony and Paulette becomes far less likely than any other of the possible inferences. In the police interrogation, Edwards testified she observed that Anthony "was very angry that his aunt [Paulette] signed for the box..." (T. II. 214). According to Edwards' testimony, Anthony said he wanted to contact "the guy in California" to determine why he did not specify his name on the package, "thereby endangering his family members for [sic] being arrested..." (T. II. 214). Even if the police testimony of Anthony's statement were to be believed, it provides substantial

[5] (T. II. 176) Edwards testified that the police found several individuals and "illegal substances" inside the home. The police made arrests based on this search.

evidence that he *never* intended anyone in the home to ever sign for, receive, or possess the package.

A conspiracy conviction can rest on circumstantial evidence, but it certainly cannot rest on an absence of evidence. Not even one piece of evidence, direct or circumstantial, admissible or inadmissible, supported the theory that Anthony had ever instructed, suggested, or agreed with Paulette to possess the package on his behalf. Similarly, not even one piece of evidence supported the theory that Paulette knew that it was specifically marijuana in the package, and not ten thousand dollars *or anything else*. (T. II. 214). There was no evidence that Anthony and Paulette cooperated in any way to possess the marijuana. When Riley knocked on the door dressed as a postal worker, Paulette accepted the package just as anyone else would. The Appellant submits the repeated admission of prejudicial hearsay in violation of Anthony's Confrontation Clause rights entitles him to a new trial. However, due to the complete absence of any other evidence to support a conspiracy count, this Court should reverse and render Anthony's conviction for conspiracy to possess marijuana.

C. *Legal Sufficiency of the Possession Charge*

There is no evidence which would lead a reasonable juror to conclude beyond a reasonable doubt that Paulette was acting on behalf of Anthony, therefore it is factually, legally, and logically impossible for Anthony to have possessed the marijuana, constructively or otherwise.

1. *Elements of Possession (Actual or Constructive)*

The Mississippi Supreme Court has laid out the required elements for the actual or constructive possession of drugs. ***Kerns v. State***, 923 So. 2d 196 (Miss. 2005). To prove possession of a controlled substance the prosecution must present "sufficient facts to warrant a finding that the defendant was *aware of the* [1] *presence* *and* [2] *character* of the particular substance." ***Dixon v. State***, 953 So. 2d 1108, 1112 (Miss. 2007) (emphasis added). Additionally, the defendant must be "[3] intentionally *and* [4] *consciously* in possession of it." ***Id.*** (emphasis added). The additional elements constituting the legal requirements of *constructive possession*, which the trial judge instructed the jury upon, are examined below in Part 3 of this Argument section.

The Mississippi Supreme Court has held the prosecution bears the burden to prove "beyond a reasonable doubt that the accused committed the act charged, and that he did so under such circumstances that *every element of the offense existed*; and where the evidence fails to meet this test it is insufficient to support a conviction." ***Johnson v. State***, 81 So. 3d 1020 (Miss. 2011) (*quoting* ***Carr v. State***, 208 So. 2d 886, 889 (Miss. 1968)) (emphasis added). In Anthony Jefferson's case, *even if* every piece of evidence offered by the prosecution at this trial in its case-in-chief was assumed to be true, the prosecution failed to prove all of the required elements to establish a possession case.

In ***Fultz v. State***, the Mississippi Supreme Court reversed and rendered a drug possession conviction, holding that the prosecution had failed to establish the elements of constructive possession. ***Fultz v. State***, 573 So. 2d 689, 691 (Miss. 1990). In ***Fultz***, the defendant was driving alone in his sister's car when a police officer pulled him over for driving erratically. ***Id.*** at 689.

The defendant failed three field sobriety tests, was arrested, and the car was impounded. The police found a small amount of marijuana in the defendant's wallet and a duffel bag of individual bags of marijuana in the trunk of the car. ***Id.*** at 690. The defendant in that case had also made "several 'unexplained stops during the night.'" At trial, the defendant was convicted of constructive possession of the marijuana found in the trunk. The Mississippi Supreme Court reversed, however, holding although the defendant had dominion or control over the marijuana, and the proximity requirement had been met, "the state [was required to] show additional incriminating circumstances to justify a finding of constructive possession." ***Id.*** at 690-91. These additional incriminating circumstances may include fingerprints on the box or evidence that the Fultz owned the bag. ***Id.*** at 690. Although the prosecution in ***Fultz*** presented a much more incriminating case than the case at hand, the evidence was held by our Supreme Court to be insufficient to create a question for the jury.

However, the State's case against Anthony Jefferson did not establish proof beyond a reasonable doubt of even the first element of possession: it is factually, legally, and logically impossible that Anthony was ever even "aware of the presence" of the package at Linda Faye's home before his arrest. It is undisputed from the record that at the time of the "controlled delivery," Anthony was not at Linda Faye's home. (T. I. 199) After Riley's "controlled delivery," the record shows that Paulette threw the package onto the porch and the police immediately took possession of it again. (T.II. 230, 225). The police had Paulette attempt to call Anthony in order to attempt to inform him that the package had arrived so the police could arrest him. (T.II. 223). Both Edwards' testimony and police report showed Paulette was unsuccessful in

attempting to reach Anthony. (T.II. 223). It is undisputed from the record no conversation ever occurred that informed Anthony the package was there. (T.II. 223-224). By the earliest moment Anthony could have known the package had arrived, the package was already securely under the police's *exclusive* dominion and control, and he was already under arrest. These facts are undisputed, and the prosecution did not prove beyond a reasonable doubt that Anthony *somehow* knew that the package was at the house. The Mississippi Supreme Court has held, as one of the base requirements for any possession, knowledge of the presence of the substance is required. ***Dixon,*** 953 So. 2d at 1112. This is *present* knowledge. Intent to possess the package at some point in the future does not satisfy present knowledge of the possession. Without this essential element, the prosecution failed to present a prima facie case of possession.

As to the second element, the police offered no credible evidence that Anthony was aware of the character of the substance. It is undisputed from the record that there is no evidence that Anthony ever saw or touched the marijuana or even the box that contained it. The only evidence that Anthony was aware of the character of the package came from the inconsistent testimonies by two police officers of an allegedly unrecorded statement by Anthony.[6]

The third and fourth elements of possession are absent for the same reason as the first: It cannot be argued that Anthony was *intentionally and consciously* in possession of the package had no way of knowing that it had arrived. Even if Anthony's alleged statement to police and inadmissible hearsay statements allegedly made by Paulette while under arrest are assumed to

[6] Issue III discusses the problems of the police interrogation.

be true, he had a future intent to possess the package and perhaps anticipated the delivery of the package at some unknown future point. He arrived to Linda Faye's home to find unmarked police cars already there and officers outside. (T.II. 222-224). He was immediately arrested while the police possessed the package. (T.II. 237).

2. *Additional Elements for a Constructive Possession Theory of Prosecution*

Constructive possession is possible even if there is no physical possession, but this requires to two additional elements of proof: The prosecution must prove that the "drug involved was subject to [the defendant's] [1] dominion *or* control" *and* [2] "[p]roximity is usually an essential element, but by itself is not adequate in the absence [of proof by the prosecution] of other incriminating circumstances." ***Dixon***, 953 So. 2d at 1112 (quoting ***Curry v. State***, 249 So. 2d 414, 416 (Miss. 1971) (emphasis added).

It is essential to a constructive possession case that the State establish by proof beyond a reasonable doubt Anthony exercised *dominion or control* over the package. In addition to the fact that Anthony did not even know that package had arrived at *Linda Faye's home*, there is no presumption of dominion or control when the defendant does not own the car or home in which the substance was found. ***Fultz***, 573 So. 2d, at 690. Similarly, there is no presumption of dominion or control when a defendant is "not in exclusive possession of the premises." ***Id.*** Not only was Anthony not the owner of the home, he did not even live there. It is undisputed from the record he had been a visitor in Linda Faye's home for a few days. (T. I. 41; T. II. 215). Not only did Anthony not *exclusively* possess the premises, as several people were within the home, in fact, since Anthony was not there, he did not possess the premises at all at the time of the "controlled

delivery," as he was likely miles away at the time. (T. II. 176). Furthermore, even if Linda Faye's house was somehow under Anthony's dominion or control, it is also undisputed from the record that the package never crossed the threshold of the front door or entered the house in any manner. (T. I. 28). When inadmissible hearsay evidence is used to establish the defendant's dominion or control over the package, constructive possession cannot be established. *See* ***Sisk v. State***, 290 So. 2d 608 (Miss. 1974). In that case, the defendant was not present at the home when police executed a search warrant of his parent's house. The parents directed the police to defendant's room where marijuana was found. The Mississippi Supreme Court held dominion or control had not been established by legally sufficient evidence:—

> The burden was upon the state to show by competent evidence sufficient facts to establish that the marijuana was subject to the dominion or control of appellant. The only evidence which the state relied on to prove the dominion and control was hearsay evidence. The only competent evidence that tended to connect appellant with the marijuana was testimony that he was seen leaving the house about two hours before the search was made. This circumstance was not sufficient to establish constructive possession of the marijuana.

Sisk, 290 So.2d at 610 (*citing* ***Curry***, 249 So.2d 414) (emphasis added).

If ***Sisk***'s precedent is analyzed in the facts of this case, it is clear the State's case-in-chief did not establish the additional elements of constructive possession. The package in this case was delivered to an address that Anthony only visited for a short time, but he was not there at the time of the "controlled delivery," the home was not his, and even if Anthony had exercised domain over the home, the package never entered the home.

Finally, the Mississippi Supreme Court has repeatedly held, "proximity is usually an essential element" to a charge of constructive possession. On other occasions, the Supreme

Court has dropped the "usually" and spoken merely of the "proximity requirement." ***Hudson v. State***, 362 So. 2d 645, 647 (Miss. 1978). In ***Hudson***, the defendant was inside of a car, and there was marijuana "secreted under the hood." In addition to finding that there was no evidence of the defendant's dominion or control, the court noted that "even the proximity is questionable since the marijuana was not inside the car... [E]ven if such were sufficient to satisfy the *proximity requirement*... there is a total absence of 'other incriminating circumstance.'" ***Id.*** at 647 (emphasis added). Similarly, in ***Dixon v. State***, the Court stated that "considering the totality of the circumstances, there must be evidence, *in addition to physical proximity*, showing that the defendant consciously exercised control over the contraband, and absent this evidence, a finding of constructive possession cannot be sustained." ***Dixon***, 953 So. 2d at 1112-13 (*quoting* ***Berry v. State***, 652 So. 2d 745, 750-51 (Miss. 1995) (emphasis added). Anthony was certainly never close enough to the package to satisfy the ***Hudson*** Court. The only time Anthony was ever in *any* sort of proximity to the box, the police exclusively possessed it, and he was in handcuffs.

The prosecution finished an error ridden trial by attempting to confuse the jury with metaphorical case facts they wished he had, but did not:

> [D]on't let the defense play word games with what possession means. Let me tell you something, I've been in here all day, my truck was parked out here. If an accomplice of mine put contraband in my truck while I've been in here... *with my knowledge*, and I go out there and *get in it to leave*... although... I never touched it, you better believe that in the eyes of the law I'm guilty of possession...

(T.II. 275) (emphasis added).

The failure of the case can be illustrated in one rhetorical question: "At what point in time did Anthony Jefferson constructively possess the package?" In order to show constructive possession, the State need only prove all of the elements exist *in unison* for only a short time, but in this case, they never did. Awareness of one's possession of a controlled substance is a required element of proof, and it is undisputed that Anthony did not know that the package was at Linda Faye's home as he rode with his father in his truck. Awareness of the character of the substance is also required, but the only evidence *the police have* that Anthony was aware of the character is a *legally insufficient* unrecorded oral statement, which contradicted a contemporaneous statement *written* by Anthony. (Exh. 4, RE. 29) Intentional and conscious possession is also required, but this essential element of proof is factually, legally, and physically impossible to establish beyond a reasonable doubt when there was never any awareness in Anthony that the package was far away at Linda Faye's house. Additionally, Anthony must have had the marijuana under his dominion or control. It would be easier to argue that Paulette, Linda Faye, or even the police had dominion or control over the package. Paulette held the package in her hands, it was then thrown onto Linda Faye's porch, and the police possessed it soon thereafter. (T. I. 224-25)

Finally, the Mississippi Supreme Court has held numerous times that proximity is usually an essential element. ***Hudson***, 362 So. 2d at 647. Given that the police were able to complete the "controlled delivery," arrest and interrogate Paulette, and have Paulette place calls in a failed attempt to contact Anthony, it is impossible Anthony was anywhere near the package before the police picked it up from the porch. Before the time of the "controlled delivery," the package

was in the exclusive possession of the U.S. Postal Service. At the time of the delivery, the package was in the *sole* possession of Riley, a police officer. For a moment, the package was in the possession of Paulette Hackett, and finally back to the police once again. Anthony never possessed the package, knowingly, actually, constructively, or otherwise. As such, the prosecution also failed to establish any of the elements of constructive possession, and this case should have never even survived a grand jury scrutiny, much less made out a *prima facie* case to survive a motion for directed verdict at the end of the prosecution's case. The trial court erred by denying the motion for a directed verdict (T.II. 262, RE. 25-27), peremptory instruction to the jury (Exh. D-9, RE. 28), and the post-trial motion for JNOV (CP. 111-12; RE. 20-22), and the Appellant maintains he is entitled to have this conviction reversed and rendered.

Therefore, since the prosecution's case-in-chief offered no evidence to conclusively prove any of the elements of conspiracy to possess marijuana *or* possession of marijuana with intent to distribute existed, the Appellant was entitled to a directed verdict, peremptory instruction to the jury, and a judgment notwithstanding the verdict, and requests this Court reverse the conviction and sentence and render this case, thereby ordering the immediate discharge of the Appellant from the custody of the Mississippi Department of Corrections.

ISSUE THREE:

Whether the Trial Court Erred in Overruling Defense's Motion to Suppress the Oral Statement Claimed by the Police, When a Statement Handwritten by the Appellant on the Same Day at Approximately the Same Time Directly Contradicted the Police Version of the Content of the Appellant's Statements during the Interrogation.

Anthony Jefferson sat in a suppression hearing before his trial was set to begin as he heard two police officers get on the stand to testify about the interrogation they conducted the after he was arrested. Anthony was not worried because he thought Moser had recorded everything he had said during that interrogation. Yet, as Anthony listened to everything they said under oath, he heard a completely different statement than what he had given to police. Anthony sat dumfounded has two police officers told the court an elaborate plan they claimed Anthony explained to them in jail. Anthony also testified that day, swearing the only thing he told the police was what he wrote that day in his written statement. (Exh. 4, RE. 29)

The Mississippi Supreme Court has recognized, "[w]hether a confession is admissible is a fact-finding function for the trial court, and its decision will not be overturned unless the trial court applied an incorrect legal standard, committed manifest error, or made a decision against the overwhelming weight of the evidence." ***Haynes v. State***, 934 So. 2d 983, 988 (Miss. 2006) (emphasis added). In Anthony Jefferson's case the trial court manifestly erred by making a decision that was against the overwhelming weight of the evidence presented at the suppression hearing. In addition, to allow the jury to hear testimony from the police regarding a supposed unrecorded oral statement made by Anthony Jefferson at the time he wrote his statement out on paper applied an incorrect legal standard. (Exh. 4, RE. 29)

Unlike the facts of the majority of the Mississippi cases that follow the ***Haynes*** rule, Anthony Jefferson was read his Miranda rights, waived counsel, and agreed to give a statement. (T. I. 63) However, the difficulty for the prosecution with police testimony about Anthony Jefferson's unrecorded oral statement is it never happened the way police said it did. Anthony

was adamant through the entire "investigation" the box was his, he did not know what was in it, and he didn't want anyone to get in trouble. (T. I. 65) When Anthony first arrived back at Paulette's house and was detained by several police officers asking about a box that came in the mail, his un-Mirandized statement on the scene was, "It's my box, I don't want anyone else to get in trouble." (T. II. 245) Lastly, during the suppression hearing, Anthony testified the police questioning lasted about 30 minutes, and immediately after giving him his Miranda form, Edwards had him write out a statement. (T. I. 64) All this happened while Anthony thought Moser was recording the interrogation with his recording device, and Moser even told Anthony, "this is for our safety." (T. I. 64) Other than this one unrecorded oral statement Candace Edwards and Anthony Moser claim Anthony made to them, Anthony's explanation was consistent the entire "investigation." In his statement written immediately after Edwards and Moser say they interrogated Anthony, he wrote, "A box came to my family [sic] house[,] and I didn't know what was in the box[.] I didn't sign for it and never seen what was in the [unknown][,] but I knew a box was coming." (Exh. 4, RE. 29)

Conversely, Edwards and Moser, sort of tell a story about an interview that lasted nearly two hours. (T. I. 58) Both officers testified neither had a recording device even though, often times Moser stated for the record he uses one during interrogations. (T. I. 59) Edwards and Moser both testified Anthony told them an elaborate story of him being a drug kingpin who came from California to sell drugs in Mississippi while attending a family funeral. (T. I. 40-43) Edwards then says that Anthony told her the box could have contained marijuana, cocaine or money, while Moser testified that Anthony told them that the box contained marijuana. (T. I. 41) Yet, after

the story about all of his plans for the box, Anthony only wrote down: "I knew a box was coming but I didn't know what was in it." (Exh. 4, RE 29) At this point, it would seem reasonable most police officers would be concerned Anthony didn't write down what he had just supposedly spent two hours talking to them about, but not these two. Again, instead of asking Anthony why his written statement didn't match his unrecorded oral statement, they simply moved on with their "investigation."

"Once the trial judge has determined, at a preliminary hearing, that a confession is admissible, the defendant/appellant has a heavy burden in attempting to reverse that decision on appeal." ***Payton v. State***, 897 So. 2d 921, 935 (Miss. 2003); ***Applewhite v. State***, 753 So.2d 1039, 1041 (Miss. 2000). However, if this Court will consider totality of the evidence given to the trial judge at the hearing, this unrecorded oral statement the police claim Anthony made should have been suppressed for a total lack of plausibility. Unrecorded oral statements, similarly to hearsay statements, should be carefully scrutinized before allowing it to be given to the jury. The only circumstantial guarantee of trustworthiness that the trial judge used to determine the admissibility of Anthony's unrecorded oral statement was police officer testimony. In ***Randall***, the Mississippi Supreme Court quoting the trial judge discussing statements given to police officers, "[a] mere statement by a police officer-excuse me, to a police officer, I don't think satisfies the equivalent circumstantial guarantees of trustworthiness." ***Randall v. State***, 806 So. 2d 185, 205 (Miss. 2001). Without any other circumstantial guarantee of trustworthiness offered by the prosecution the trial judge should have suppressed the unrecorded oral statement. Even in 1988, the Mississippi Supreme Court thought that recording custodial

interrogations is important in many context and that, "[i]f a recording does exist it will often help to demonstrate the voluntariness of the confession, the context in which a particular statement was made, and of course, the actual content of the statement." ***Williams v. State***, 522 So. 2d 201, 208 (Miss. 1988) (emphasis added).

When looking at the overwhelming weight of the evidence, it is clear the trial court should have concluded that this unrecorded oral statement never happened. From the differences in how long the interview actually lasted, to Moser claiming to have recorded it or purposefully not recording it, to Edwards' claim she never recorded interrogations, or to the possibility Moser actually recorded the questioning that day, the trial judge had every warning to not trust or put any credibility in the circumstances surrounding police testimony of this unrecorded oral statement. The two officers could not even get on the same page as to what Anthony told them was supposed to be in the box. (T. I. 41, 214, 232)

Moser and Edwards' failure to record the oral statements makes their "investigation" more suspicious, especially when faced with *a subsequent written statement* that plainly contradicts what the police say the oral statement contained. The written statement should have prompted any reasonable police officer to immediately confront Anthony with the contradictions in the written statement, then find and use a tape recorder to find the *real truth* of the interrogation.

"On May 22, 2014, the DOJ announced a substantial change in its policy, creating a presumption that FBI, DEA, ATF, and United States Marshals Service (USMS) agents will electronically record custodial interviews." ***Dep't of Justice, New Department Policy Concerning***

Electronic Recording of Statements, 128 Harv. L. Rev. 1552 (2015)[7]. The Department of Justice, similarly to at least 22 other States, the benefits of recording custodial interrogations are numerous, but include increased reliability and efficiency. ***Id.*** Though in complete opposition of the reasoning of the DOJ about reliability, as Agent Edwards testified, "[i]t's convenient not to [record interrogations]." (T. II. 218) Anthony also claimed that he was not read the Miranda rights, and the agents testified that he was, but it is impossible to know without a recording. (T. I. 62-63) All of the allegations of fabrication made by both sides could have been easily solved by simply recording the custodial interrogation. Given the prevalence of technology in the year 2011, the fact that nearly every police officer carries a cellphone or a recording device around with them all day, it is inexcusable to not have some kind of recording of the interrogation in this case. The mere absence of a recording in the face of Edwards' testimony, "[i]t's convenient not to [record interrogations]," deprives the credibility of the police *oral* version of the interrogation and validates Anthony's claim about his *written* statement. Given the nature of the alleged unrecorded oral statement, the trial court should have more carefully analyzed the Appellant's claim he did not tell the police the information to which they testified in the Motion to Suppress hearing. (T. I. 73-74, CP 50-51, RE. 33)

Looking at the overwhelming weight of the evidence presented at the pre-trial suppression hearing, the trial court should have suppressed any mention of the *oral* statement in preference of the *written* statement, and the Appellant requests this Court to find the trial

[7] http://harvardlawreview.org/2015/03/dept-of-justice-new-department-policy-concerning-electronic-recording-of-statements/ (website last visited November 4, 2015).

judge was in error to refuse to do so, reverse this case, and remand it to the lower court with proper instructions for a new trial.

CONCLUSION

From the beginning, Anthony Jefferson's arrest and trial was clouded with surprise and unfairness. Anthony was arrested and convicted for conspiring with Paulette although no evidence showed that they had ever agreed or conspired to do anything. He was convicted of possessing marijuana that he did not know existed, based on an unrecorded statement to police officers that he never made. Anthony's attorney was never able to confront a key prosecution witness who established the only communication that ever occurred between Paulette and anyone else in this case.

Through inadmissible hearsay and a case that failed to provide any evidence of a conspiracy to possess marijuana between Anthony and Paulette, Anthony was convicted and sentenced to sixty years in prison without the possibility of parole. Without this Court's reversal, he will not leave prison until the year 2074, at age ninety-three. Anthony will likely die in prison.

This Court should reverse and render Anthony's conviction, as the evidence provided against him was legally insufficient. Alternatively, this Court should reverse and remand this case for a new trial, as the admission of hearsay evidence prejudiced the jury and violated both the Mississippi Rules of Evidence and Anthony's constitutional right to confront witnesses against him.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, Phillip W. Broadhead, Criminal Appeals Clinic Professor and attorney for the Appellant herein, do hereby certify that I have this day mailed postage fully pre-paid/hand delivered/faxed, a true and correct copy of the foregoing Brief of Appellant to the following interested persons:

Honorable William E. Chapman, Circuit Court Judge
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I, Phillip W. Broadhead, attorney for the Appellant herein, hereby certify that on this day, I electronically filed the foregoing Record Excerpts with the Clerk of the Court using the MEC system which sent notification of such filing to the following:

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This the 5th day of November, 2015.

/s/ *Phillip W. Broadhead*
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